

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

GERARDO CASTRO-PRIETO,

Defendant/Petitioner.

CASE NO. CR-06-6049-EFS
[CASE NO. CV-14-5040-EFS]

ORDER DENYING MR. CASTRO-PRIETO'S
§ 2255 MOTION, AND CLOSING FILE

On March 24, 2014, Mr. Castro-Prieto filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 48. After reviewing the record, the Court finds summary dismissal of the § 2255 motion is warranted because it is untimely and therefore Mr. Castro-Prieto is plainly not entitled to relief. See 28 U.S.C. § 2255; Rule 4, 28 U.S.C. foll. § 2255. For the reasons set forth below, Mr. Castro-Prieto's § 2255 motion is denied.

A. Background

In 2006, Mr. Castro-Prieto was charged in four separate indictments in the Eastern District of Washington:

- CR-06-6008-EFS (Alien in the United States after Deportation in violation of 8 U.S.C. § 1326);
- CR-06-6012-EFS (Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1));
- CR-06-6049-EFS (Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. §§ 924(c)(1)(A) and Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1)); and

- CR-06-6050-EFS (Felon in Possession of a Firearm in violation of 21 U.S.C. § 841(a)).

On September 12, 2006, Mr. Castro-Prieto entered a guilty plea, without a plea agreement, to the Alien in the United States After Deportation count in CR-06-6008-EFS ("Alien Count"). CR-06-6008-EFS, ECF No. 24. On September 27, 2006, Mr. Castro-Prieto entered a guilty plea to the Felon in Possession of a Firearm count in CR-06-6012-EFS ("Felon-with-Firearm Count"). In the Felon-with-Firearm Count plea agreement, the USAO agreed to recommend a sentence at the low end of the applicable Sentencing Guideline range and to recommend a concurrent sentence with the to-be-imposed sentence for the Alien Count. CR-06-6012-EFS, ECF No. 48.

On January 19, 2007, a change-of-plea hearing occurred in CR-06-6049-EFS, wherein Mr. Castro-Prieto pled guilty to Count 1 ("Drug-Trafficking-Firearm Count") in return for the U.S. Attorney's Office (USAO) dismissing Count 2 in CR-06-6049-EFS, as well as the single count in CR-06-6050-EFS. CR-06-6049-EFS, ECF No. 36. In the parties' binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, the parties acknowledged that the Court was statutorily required to impose at least a five-year sentence for the Drug-Trafficking-Firearm Count. The parties asked the Court to impose a sentence of five years for the Drug-Trafficking-Firearm Count in CR-06-6049, as well as a consecutive five-year term of imprisonment for the Alien Count and Felon with Firearm Count that Mr. Castro-Prieto previously plead guilty to in CR-06-6008-EFS and CR-06-6012-EFS, respectively. CR-06-6049-EFS, ECF No. 36 ¶ 9. The Court accepted Mr. Castro-Prieto's

1 guilty plea to the Drug-Trafficking-Firearm Count, but delayed
2 accepting the binding plea agreement at that time.

3 On February 20, 2007, the Court held a hearing in all four
4 criminal matters involving Mr. Castro-Prieto. In CR-06-6008-EFS, CR-
5 06-6012-EFS, and CR-06-6049-EFS, the Court held sentencing. After
6 reviewing the presentence investigation reports, sentencing-related
7 material, and relevant authority, and hearing from counsel and Mr.
8 Castro-Prieto, the Court accepted the parties' binding global
9 sentencing recommendation for the three Counts to which Mr. Castro-
10 Prieto pled guilty.¹ The Court sentenced Mr. Castro-Prieto to sixty
11 months on the Alien Count and Felon-with-Firearm Count to run
12 concurrently with each other, and sixty-months on the Drug-
13 Trafficking-Firearm Count to run consecutive to the other two
14 sentences, as required by 18 U.S.C. § 924(c)(1)(A)(i). CR-06-6049-
15 EFS, ECF No. 42. The Court granted the USAO's motion to dismiss the
16 second count in CR-06-6012-EFS and the indictment in CR-06-6050-EFS.

17 On September 26, 2013, Mr. Castro-Prieto sought relief from his
18 sentences pursuant to 18 U.S.C. § 3582 and the Fair Sentencing Act of
19 2010. ECF No. 45. On October 17, 2013, the Court denied Mr. Castro-
20 Prieto's motion. ECF No. 46.

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22
23 ¹ In his § 2255 motion, Mr. Castro-Prieto states that the Court rejected
24 the parties' plea agreement. This is incorrect. The Court accepted the
25 parties' proposed binding plea agreement under Rule 11(c)(1)(C) prior to
imposing sentence.

1 Mr. Castro-Prieto filed the instant § 2255 motion on March 24,
 2 2014. ECF No. 48. Mr. Castro-Prieto's motion asserts the following
 3 three claims:

4 1) Mr. Castro-Prieto is innocent of the Drug-Trafficking-
 5 Firearm Count and therefore should not have been sentenced
 6 pursuant to 18 U.S.C. § 924, nor should Sentencing
 7 Guideline § 2K2.1(a)(4)(A) and § 2K2.1(b)(1)(A) have been
 8 applied;

9 2) Mr. Castro-Prieto's prior second-degree assault conviction
 10 should not have been used both as an "aggravated felony"
 11 under § 2K2.1(a)(4)(A) and for deportation purposes under
 12 *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); and

13 3) Defense counsel failed to provide Mr. Castro-Prieto with
 14 effective assistance of counsel by failing to investigate,
 15 consider deportation implications, contest the Court's plea
 16 rejection,² and otherwise defend Mr. Castro-Prieto.

17 Although Mr. Castro-Prieto's judgments became final in 2008, Mr.
 18 Castro-Prieto submits that his above claims are ripe for review based
 19 on the U.S. Supreme Court's June 17, 2013 decision in *Alleyne v.*
 20 *United States*, 133 S. Ct. 2151 (2013).

21 **B. Standard**

22 A § 2255 motion may seek relief on the grounds that 1) the
 23 judgment was rendered without jurisdiction, 2) the imposed sentence
 24 was not authorized by law, or 3) the judgment is vulnerable to
 25 collateral attack because the petitioner's constitutional rights were
 26 denied or infringed. 28 U.S.C. § 2255(a) & (b). Yet, this relief
 must be sought within one-year of the latest of:

² As the Court earlier noted, Mr. Castro-Prieto's assertion that the Court rejected the parties' proposed plea agreement is incorrect.

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases or collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Unless the § 2255 motion and record conclusively show that the petitioner is not entitled to § 2255 relief, the Court is to serve the § 2255 motion on the USAO. *Id.*; see *United States v. Withers*, 638 F.3d 1055, 1062-63 (9th Cir. 2011) (“[A] district court may summarily dismiss a § 2255 motion only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are palpably incredible or patently frivolous.”).

C. Analysis

The Court finds summary dismissal of Mr. Castro-Prieto's § 2255 motion is necessary because his claims are not filed within § 2255's one-year statute of limitations. Clearly more than one year has passed since Defendant's judgment became final in 2008. And the only § 2255(f) subsection on which Mr. Castro-Prieto relies is § 2255(f)(3): a date a new right was recognized by the Supreme Court. Mr. Castro-Prieto posits that his § 2255 motion is timely in light of the June 17, 2013 *Allevne* decision.

Although Alleyne was decided by the Supreme Court less than a year ago, the relief sought by Mr. Castro-Prieto is not based on the

1 Alleyne decision. In *Alleyne*, the Supreme Court extended the rule
2 that "[a]ny fact that by law, increases the penalty for a crime is an
3 'element that must be submitted to the jury and found beyond a
4 reasonable doubt" to mandatory minimum sentences. 133 S. Ct. at 2155.
5 Accordingly, "any fact that increases the mandatory minimum is an
6 'element' that must be submitted to the jury." *Id.*

7 Here, the only count to which Mr. Castro-Prieto pled guilty
8 which was subject to a mandatory minimum sentence was the Drug-
9 Trafficking-Firearm Count (Count 1 in CR-06-6049-EFS). Yet, the
10 record, including the Indictment and Plea Agreement, conclusively
11 shows that Mr. Castro-Prieto was adequately warned of the consequences
12 of pleading guilty to the Drug-Trafficking-Firearm Count and by
13 pleading guilty he waived his right to have the jury determine the
14 facts which subjected him to the mandatory-minimum five-year sentence.

15 The Indictment's caption and the Drug-Trafficking-Firearm Count
16 language clearly reference 18 U.S.C. § 924(c)(1)(A). ECF No. 1. The
17 Indictment therefore cautioned Mr. Castro-Prieto that he was charged
18 with violating 18 U.S.C. § 924(c)(1)(A). Section 924(c)(1)(A) lists
19 different mandatory minimum sentences based on the defendant's
20 firearm-related conduct. The lowest mandatory minimum is five years:
21 for possessing a firearm during and in relation to any crime of
22 violence or drug trafficking crime, *id.* § 924(c)(1)(A)(i). The
23 mandatory minimum then increases depending on whether the firearm was
24 brandished (7 years), *id.* § 924(c)(1)(A)(ii), or discharged (10
25 years), *id.* § 924(c)(1)(A)(iii). The Indictment alleged facts
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1 consistent with a violation of subsection (c)(1)(A)(i)³: the five-
 2 year mandatory minimum offense.

3 The Plea Agreement cites § 924(c)(1)(A)(i) and identifies the
 4 following elements:

5 First, the Defendant committed the crime of possessing
 6 methamphetamine with intent to distribute as charged in
 Count 2 of the Indictment; and

7 Second, the Defendant knowingly possessed a firearm; and

8 Third, the Defendant possessed the firearm during and in
 9 relation to the possession of methamphetamine with intent
 to distribute.

10 ECF No. 36 ¶ 5. The Plea Agreement's Factual Basis and Statement of
 11 Facts contained facts supporting these three elements. *Id.* ¶ 6. And
 12 the Plea Agreement identified the punishment for this Count as "a
 13 mandatory minimum term of imprisonment of 5 years" *Id.* ¶ 1.

14 Accordingly, not only did the Indictment and Plea Agreement
 15 advise Mr. Castro-Prieto of the Drug-Trafficking-Firearm charge and
 16 its necessary elements, but the Plea Agreement identified the correct

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 18 ³ The Drug-Trafficking-Firearm Count alleges:

19 That on or about January 28, 2006, in Kennewick in the
 20 Eastern District of Washington, the defendant, GERARDO
 21 CASTRO-PRIETO, knowingly possessed a firearm, to wit,
 22 a Beretta, model 92FS, 9mm caliber pistol, serial
 23 number BER280550Z, in furtherance of a drug
 24 trafficking crime for which he may be prosecuted in a
 court of the United States, to wit: Possession with
 Intent to Distribute a Controlled Substance, in
 violation of Title 18, United States Code, Section
 924(c)(1)(A).

25 ECF No. 1.

1 mandatory minimum sentence that applies to that charge. Therefore,
 2 prior to pleading guilty to the Drug-Trafficking-Firearm Count, Mr.
 3 Castro-Prieto was advised 1) he was being charged with violating 18
 4 U.S.C. § 924(c)(1)(A), 2) of the necessary elements for a §
 5 924(c)(1)(A)(i) conviction, 3) that a § 924(c)(1)(A)(i) conviction
 6 carried with it a five-year-mandatory minimum sentence, and 4) that he
 7 was giving up his right to have a jury find the elements of this
 8 offense by pleading guilty to the Drug-Trafficking-Firearm Count, see
 9 ECF No. 36 ¶ 4.

10 By pleading guilty under this record, Mr. Castro-Prieto waived
 11 his right to have the jury decide the facts that subjected him to §
 12 924(c)(1)(A)(i)'s mandatory minimum five-year sentence: therefore,
 13 Alleyne's new rule of law does not apply to Mr. Castro-Prieto. In
 14 addition, Alleyne does not alter the Supreme Court's decision in
 15 *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that a court
 16 can determine the defendant's criminal history, even if the court's
 17 criminal-history calculation exposes the defendant to greater
 18 imprisonment. See *United States v. Johnson*, 743 F.3d 1110, 1111 (7th
 19 Cir. 2014). For these reasons, the record conclusively shows that Mr.
 20 Castro-Prieto is not entitled to § 2255 relief under Alleyne.⁴

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 22 ⁴ Because the record is clear, the Court need not analyze whether
 23 Alleyne applies retroactively. However, the Circuits that
 24 analyzed this issue have ruled Alleyne does not apply
 25 retroactively on collateral review. See *United States v. Redd*,
 26 735 F.3d 88 (2d Cir. 2013); *United States v. Winkelman*, --- F.3d -

1 Because Alleyne does not offer Mr. Castro-Prieto relief, he may not
2 utilize Alleyne as the basis from which to calculate § 2255(f)'s one-
3 year statute of limitations. Mr. Castro-Prieto's § 2255 motion is
4 therefore denied as time barred.

5 **D. Conclusion**

6 For the above-given reasons, **IT IS HEREBY ORDERED:**

7 1. Mr. Castro-Prieto's Motion to Vacate, Set Aside, or Correct
8 a Sentence Pursuant to 28 U.S.C. § 2255, **ECF No. 48**, is
9 **DENIED**.

10 2. This file shall be **CLOSED**.

11 3. The Court certifies any appeal of this dismissal would not
12 be taken in good faith.

13 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
14 Order and provide copies to Mr. Castro-Prieto and counsel.

15 **DATED** this 23rd day of April 2014.

16
17 s/ Edward F. Shea
EDWARD F. SHEA
18 Senior United States District Judge
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23 ---, 2014 WL 1228194 (3rd Cir. 2014); *United States v. Stewart*,
24 540 Fed. Appx. 171 (4th Cir. 2013) (unpublished opinion); *Simpson*
25 v. *United States*, 721 F.3d 875 (7th Cir. 2013); *In re Payne*, 733
F.3d 1027 (10th Cir. 2013).